87-1468

No. _____

Supreme Court, U.S.
FILED
FEB 22 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM. 1988

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JERRY J. PHILLIPS. PETITIONER

VS.

DIANA MINER

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# PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA

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JERRY J. PHILLIPS
PLAINTIFF AND APPELLANT

6600 FIRST STREET
ALEXANDRIA. LOUISIANA
71303
(318) 487-8627

## QUESTIONS PRESENTED

1. WHETHER A PARTY INVOLVED IN A LEGAL ACTION SHOULD BE PENALIZED FOR ERRORS ON THE PART OF THE COURT?

2. WHETHER A LITIGANT CAN BE TRIED UNDER REGULAR AND SMALL CLAIMS COURTROOM RULES SIMULTANEOUSLY?

3. WHETHER, WHEN A CASE IS TAKEN UNDER ADVISEMENT, BRIEFS BASED ON SMALL CLAIMS RULES ARE VALID IN A CASE THAT WAS CHANGED TO REGULAR DOCKET?

TABLE OF CONTENTS


| | Page |
|---|---|
| QUESTION PRESENTED..... | 1 |
| TABLE OF CONTENTS..... | ii |
| TABLE OF AUTHORITIES..... | iv |
| OPINION BELOW..... | 1 |
| JURISDICTION..... | 1 |
| CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED..... | 3 |
| STATEMENT OF THE CASE..... | 6 |
| a) Proceedings in the Louisiana Supreme Court..... | 6 |
| b) Proceedings in the Third Circuit Court of Appeals..... | 7 |
| c) Proceedings in the City Court..... | 8 |
| d) Facts..... | 8 |
| REASONS FOR GRANTING THE WRIT | |
| Whether the error on the part of the Pineville City Court, resulting in the confusion of the type docket, and the error in misinforming the petitioner as to the time limit to appeal, caused the petitioner to lose his right to due process of law..... | 18 |
| The Issue..... | 18 |
| a) Introduction..... | 18 |
| b) Law..... | 20 |

CONCLUSION..... 29

## TABLE OF AUTHORITIES


Page

Constitutional Provisions

Fifth Amendment..... 3

Fourteenth Amendment..... 3

**Cases**

Maxie v. Juban Lumber Co.
441 so 2d 181..... 13

Portier v. Marquette Cas Co.
245 La. 702. 160 So 2d 585 (1964)... 28

Salles v. Jacquet
106 La. 643. 31 So 153 (1901).... 26-27

Wilder v. Jackson
150 La. 864. 91 So 245 (1922)..... 26

**Statutes Cited**

L.S.A.-R.S. 9:3251. et. seq...3-4.10,12-15.22

L.S.A.-R.S. 13:4207 ..... 5.15

L.S.A.-R.S. 13:5200 et. seq. ..... 12.20.24

Louisiana Code of Civil Procedure
Article 5002..... 25-26

Louisiana Code of Civil Procedure
Article 2126..... 26

Petitioner Jerry J. Phillips respectfully prays that a Writ of Certiorari be issued to Review the Judgment and Opinion of the Louisiana Supreme Court entered on December 11, 1987

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## OPINION BELOW

The opinion of the Louisiana Supreme Court is not reported. The opinions of the Third Circuit Court of Appeal, State of Louisiana are not reported. The opinion of the Pineville City Court, Parish of Rapides is not reported.

## JURISDICTION

The Judgement of the Supreme Court of the State of Louisiana was entered on December 11, 1987. This Court's jurisdiction is invoked under 28 U.S.C. Section 1257 (3). since the judgements of the courts below have

infringed rights, privileges and immunities specially set up and claimed under the Constitution of the United States.

## CONSTITUTIONAL AND STATUTORY PROVISIONS RELIED UPON

Fifth Amendment, United States Constitution provides in relevant part:

> No person shall ... be deprived of life, liberty, or property, without due process of law ...

Fourteenth Amendment, United States Constitution provides in relevant part:

> Section 1. ...No State shall ... deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Louisiana Revised Statute 9:3251 (A. & B.):

> A. Any advance or deposit of money furnished by a tenant or lessee to a landlord or lessor to secure the performance of any part of a written or oral lease or rental agreement shall be returned to the tenant or lessee of residential or dwelling premises within one month after the lease shall terminate, except that the landlord or lessor may retain all or any portion of the advance or deposit which is reasonably necessary to

remedy a default of the tenant or to remedy unreasonable wear to the premises. If any portion of an advance or deposit is retained by a landlord or lessor, he shall forward to the tenant or lessee, within one month after the date the tenancy terminates, an itemized statement accounting for the proceeds which are retained and giving the reasons therefor. The tenant shall furnish the lessor a forwarding address at the termination of the lease, to which such statements may be sent.

C. Paragraph A of this Section shall not apply when the tenant abandons the premises, either without giving notice as required or prior to the termination of the lease.

Louisiana Revised Statute 9:3252 :

**Damages.** The willful failure to comply with R.S. 9:3251 shall give the tenant or lessee the right to recover actual damages or TWO HUNDRED AND NO/100 DOLLARS, whichever is greater, from the landlord or lessor, or from the lessor's successor in interest. Failure to remit within thirty days after written demand for a refund shall constitute willful failure.

Louisiana Revised Statute 9:3253 :

**Costs and attorney's fees.** In action brought under R.S. 9:3252, the court may in its discretion award costs and attorney's fees to the prevailing party.

Louisiana Revised Statute 13:4207 provides in relevant part:

> The district judges and the judges of the city courts, shall render judgments in all cases taken under advisement by them, within thirty days from the time the cases are submitted for their decision. ...

## STATEMENT OF THE CASE

a) Proceedings in the Supreme Court of the State of Louisiana.

Petitioner Phillips Appealed to the Supreme Court of Louisiana from an adverse ruling in the Court of Appeal, Third Circuit, State of Louisiana in which a request for appeal was turned down. Request for Writ of Certiorari and/or Review, Supervisory Review: to the Court of Appeal, Third Circuit, State of Louisiana. No. CA87-0903: Parish Of Rapides Pineville City Court Number 85-311 SC was denied December 11, 1987. Petitioner Phillips has now instituted the present action.

b) Proceedings in the Court of Appeal, Third Circuit, State of Louisiana.

On April 24, 1987, petitioner Phillips submitted an appeal to the Louisiana Third Circuit Court of Appeal asking the court to review the judgement of the Pineville City Court. On August 31, 1987, respondent Miner issued a Motion to Dismiss due to appeal being untimely submitted. On September 28, 1987, the Court of Appeal ruled in favor of respondent Miner, and against petitioner Phillips. On October 16, 1987, petitioner Phillips requested a reconsideration from the Third Circuit Court of Appeal on its earlier decision. On October 21, 1987, the request was denied.

c) Proceedings in the Parish of Rapides Pineville City Court.

This suit was brought by petitioner Phillips in the Small Claims Division of the Parish of Rapides Pineville City Court November 6, 1985. Respondent Miner answered, denying petitioners' allegations, and making a reconventional demand. This case came up before Judge F. Jean Pharis of the Pineville City Court. The Court ruled on behalf of respondent Miner, and against petitioner Phillips.

d) Facts.

Petitioner (Lessor) and respondent entered into a rental agreement dated October 10, 1985 for a period begining October 11, 1985 and ending April 30, 1986. The agreement stated. in relevant parts. that:

1) "Lessee agrees to pay to Phillips Real Estate Agency the sum of $350.00 per month as rental.

2) "No animals or pets of any kind will be permitted to be kept on or about the premises without the prior written consent of Representitive... . If evidence of pets is found inside premises without the expressed consent the clean-up/damage security deposit will be forfieted.

3) "You may cancel your obligation under this lease agreement by delivering to Lessor in writing a notice of your intention to cancel this lease agreement. Such notice will be effective thirty (30) days from the date it is given. The notice must be accompanied by payment of a cancellation fee equal to one month's rent plus payment of the rent due for the last month or portion thereof of occupancy. Such payment will release Lessee only from any further rental obligations beyond the date the cancellation is effective. However, all other terms of the lease agreement must be complied with, through the date of vacation of the premises on or before the effective date of the cancellation. Lessor shall retain all remedies for non-compliance with the Lease Agreement and Lessee shall be liable for any damages for non-compliance.

On November 6, 1985 a suit was brought by petitioner Phillips in the Small Claims Court of the Parish of Rapides Pineville City Court against respondent Miner. Petitioner claimed past due rent for October 1985 ($87.09), and

for breaking and violating the lease (one months rent at $350.00 plus cancellation fee of $350.00) with legal interest from date of judicial demand, November 6, 1985, until paid for and all costs of the proceedings. Subsequent to the filing of the suit, respondent Miner paid petitioner the $87.09. On November 27, 1985, a request was made by respondent to have this case placed on the regular docket.

The case came on for trial on July 15, 1986, before Judge Pharis. At the time of the trial no copy of the request to have the case placed on regular docket, nor any other information indicating the same, had been sent to petitioner Phillips or his counsel. Before the trial proceeded, Judge Pharis asked in general if the case had been transferred to regular docket. Counsel for the petitioner stated that it had not been transferred to his knowledge. During the

trial the Court dismissed the court reporter under the assumption that the case was still on small claims docket and there was no need to keep minutes. Due to this action there are no minutes of the proceedings in the court records.

At the conclusion of the trial. the Court ruled in favor of respondend Miner and against petitioner Phillips. The Court indicated that it was the intention of the Court to retroactively cancel the lease in question and to award respondent Miner the return of her lease money. In addition the Court indicated that it intended to award respondent Miner $750.00 in attorney's fees on the basis that her security deposit was not returned to her under the provisions of Louisiana Revised Statute 9:3251, et. seq.

The case was taken under advisement due to questions concerning the right of respondent

to receive compensation for attorney's fees and the return of her security deposit. Trial briefs were entered by counsels for both parties.

The arguments in law used by counsel for the respondent are as follows:

> "...it was Mr. Phillips who chose the forum of small claims court.
>
> "Essentially small claims court is an equity court created by statute. L.S.A.-R.S.13:5200 et seq. Small claims court has the jurisdiction over cases where the amount in dispute does not exceed $2.000.00 and the court has authority to grant any appropriate relief. L.S.A.-R.S. 13:5202. The technical rules of the evidence in small claims court are suspended and any relevant evidence is admissible as long as the court determines it is competent. L.S.A.-R.S.13:5203. The parties are not bound by statutory provisions of rules governing practice prodedure, pleading or evidence, and the court conducts these hearings in such a manner as to do substantial justice between the parties. L.S.A.-R.S. 13:5207. Additionally, there is no appeal from the small claims division of this court. L.S.A.-R.S. 13:5209.

The arguments in law used by the counsel for the petitioner, in pertinent part, reads as follows:

> "...Diana Miner did not make any specific issue over the security deposit in her reconventional demand. Therefore, the security deposit issue is not even properly before the Court. However, if the Court deems that the security deposit issue is properly before it, then Jerry Phillips earnestly contends that it would be erroneous for the Court to order the refund of the security deposit in the amount of TWO HUNDRED AND NO/100 ($200.00) DOLLARS as the security deposit was clearly forfeited under the terms of the written lease that was introduced into evidence. On the front page of the written lease there is language clearly to the effect that no animals or pets of any kind will be permitted in or about the leased premises without prior written consent and that a violation of this provision of the lease will cause the forfeiture of the security deposit. Since Diana Miner admittedly had a pet on the leased premises and since there was no showing of any prior written consent, it is submitted that the security deposit must be deemed forfeited under the terms of the written lease in question.
>
> "Jerry Phillips further contends that it would be totally improper for this Court to allow an award of attorney's fees against him under the provisions of Louisiana Revised Statute 9:3251-9:3253.

Under these statutes, an award of damages and attorney's fees is allowable only in the situation where the landlord fails to make a proper remittance or accounting of a security deposit or damage deposit within thirty (30) days after written demand for a refund has been given to him by the lessee. In addition, the lessee is to provide the lessor with a forwarding address at the termination of the lease. In this case, there was absolutely no evidence to show that Diana Miner provided Jerry Phillips with any forwarding address nor was there any evidence whatsoever to show that she made any written demand whatsoever on Jerry Phillips for the return of her security deposit. In fact, as is pointed out hereinabove, the pleadings filed on behalf of Diana Miner did not even put Jerry Phillips on notice that Diana Miner was claiming any damages or attorney's fees under the provisions of Louisiana Revised Statute 9:3251-9:3253. Since Jerry Phillips was not put on notice of any such issue by the pleadings and therefore did not have any opportunity to present any defense on this issue, it is submitted that an award of damages and attorney's fees based on an alleged violation of Louisiana Revised Statute 9:3251, et.seq., would be most improper. However, even if the Court feels that this issue was fairly presented in the pleadings of Diana Miner, it is submitted that Diana Miner is clearly not entitled to the recovery of attorney's fees and damages as the evidence does not show that she made any written demand on Jerry Phillips for the return of her security deposit nor provided him with a forwarding address.

> According to the case of Maxie v Juban Lumber Company, 441 So.2nd 181, and the cases cited therein, a lessee may not recover damages and attorney's fees from a lessor for alleged violations of Louisiana Revised Statute 9:3251, et. seq., unless the lessee has made written demand upon the lessor in accordance with Louisiana Revised Statute 9:3252. In this case, there simply is no evidence whatsoever to support the damage claim or the attorney's fee claim of Diana Miner under Louisiana Revised Statute 9:3251, et. seq., and these claims should accordingly be denied."

On March 4, 1987, counsel for petitioner Phillips, Walter M. Hunter, Jr., withdrew as attorney of record for Jerry J. Phillips.

On March 24, 1987, (a period of 8 months and 9 days after the trial, a delay which is in direct violation of Louisiana Revised Statute 4207) Judge Pharis signed, in open court, judgment denying the demands of petitioner Phillips, and in favor of respondent Miner. The Judgement reads in pertinent part as follows:

> "This matter came on for hearing pursuant to regular assignment, answer

and reconventional demand having been filed to plaintiff's petition, and when after considering the pleadings, evidence, offerings and testimony, the Court being of the opinion that Diana Miner has made due proof of her demands, to the extent as hereinafter set out and the law and the evidence being in favor thereof, for the reasons orally assigned, it is, therefore,

"ORDERED, ADJUDGED AND DECREED that there be and judgment is hereby rendered in favor of DIANA MINER, and against JERRY J. PHILLIPS, in the full sum of TWO HUNDRED AND NO/100(200.00) DOLLARS, together with legal interest theron from the date of judicial demand until paid, which said sum represents the return of the security deposit to Diana Miner. It is further

"ORDERED, ADJUDGED AND DECREED that there be and judgment is hereby rendered in favor of DIANA MINER, and against JERRY J. PHILLIPS, in the full sum of SEVEN HUNDRED FIFTY AND NO/100 ($750.00) DOLLARS, for attorney's fees, together with legal interest theron from the date of judicial demand until paid. It is further

"ORDERED, ADJUDGED AND DECREED that there be and judgment is hereby rendered and the demands of the petitioner, Jerry J. Phillips, are denied. It is further

"ORDERED, ADJUDGED AND DECREED that there be and judgment is hereby rendered condemning JERRY J. PHILLIPS to pay all costs of these proceedings."

The petitioner was notified of the Judgement on April 10. 1987.

On April 24. 1987 an unsuccessful appeal was submitted to the Court of Appeal. Third Circuit. State of Louisiana. Upon motion to dismiss. brought by respondent Miner. the appeal was dismissed September 28. 1987. A further motion to reconsider was filed October 16. 1987. but motion to reconsider was denied October 21. 1987.

On October 27. 1987. an appeal was sent to the Louisiana Supreme Court. and. on December 11. 1987. in a four to two decision. the appeal was denied.

## REASON FOR GRANTING THE WRIT

The Issue.

Whether the error on the part of the Pineville City Court, resulting in the confusion of the type docket, and the error in misinforming the petitioner as to the time limit to appeal, caused the petitioner to lose his right to due process of law.

a) Introduction:

The respondent here, Miner, was charged with failure to pay past due rent and breaking a lease agreement. Respondent requested that the case be changed to a regular docket. The Court failed to inform petitioner of the change of docket, and, even when the case came up for trial, the trial court was uncertain of the status of the docket. Evidence was presented by both counsels, the case was taken under advisement

and, after a delay in excess of eight months, the Court found in favor of respondent.

Petitioner Phillips , who was at this time without counsel, and was further burdened with a twenty eight year old daughter who was dying with cancer, asked for an appeal, but the appeals court dismissed the motion as being filed untimely. Petitioner asked the appeals court to reconsider its opinion, claiming that the Court of original jurisdiction had granted him, in a letter, thirty days to submitt his appeal, and that the appeal should be considered as having been filed nunc pro tunc, thus rendering it timely. The motion to reconsider was denied. Petitioner then filed an appeal with the Louisiana Supreme Court asking for a Writ of Certiorari and/or Review, Supervisory Review. In a 4-2 decision, the Court denied petitioners' request.

b) Law:

The trial in the Pineville City Court was heard on a regular docket, although the counsel for the petitioner and the petitioner were not aware of the change in docket from small claims to regular docket. The counsel for the petitioner treated the testimony of the respondent in a manner consistent with a small claims docket by not objecting to any testimony given on her behalf. This was done in accordance with L.S.A.-R.S. 13:5203 and with L.S.A.-R.S. 13:5207 (both of which are cited in the arguments in law used by counsel for the respondent in his brief to the Pineville City Court concerning the questions which were taken under advisement.)

On the other hand, counsel for the respondent, aware of the change in docket, treated testimony given on behalf of the petitioner in a manner consistent with such

change. It is submitted that the Court failed in its duty to question the manner in which testimony was treated. However, if it is found that the court was within its duty not to question the manner in which testimony was treated, then it must be assumed that the court was aware of the change of docket. In the event that the court was aware of the change of docket, then petitioner contends that the court should have ruled in favor of the petitioner upon evidence cited by both counsels in the memorandums submitted to resolve the questions which were taken under advisement. It should be recalled that the law and argument used by respondent pertained only to small claims rules and therefore should not have had any bearing in this case. The law and argument used by the petitioner, although still under the assumption that the case was under small claims docket, presented facts in law that pertained to the provisions

of Louisiana Revised Statite 9:3251. which was what the Court had used as reason to come to its indicated intensions at the trial. Further. the court should have ruled accordingly even if it was not aware of the change in docket at the time of trial due to the fact that the court stated in its judgment:

> "This matter come on for hearing pursuant to regular assignment..."

Therefore. by the time of the judgment. the Court must have been aware of the change. and. in so knowing. should have been aware that the law and argument used by respondent. pertaining only to small claims rules. was invalid in this case.

The court also made a crucial error in dismissing the court reporter. By doing this no minutes were taken and no record was made. It is submitted that after an eight month delay. there could not have been sufficient

records to refresh the Court as to the proceedings of the case in order to come to a fair judgment. Furthermore, by not taking minutes, the Court has placed an undue burden on the petitioner in making any appeal of the judgment by making undisputable records of the proceeding unavallable.

A third error made by the court was in misinforming petitioner of the right to appeal. The petitioner was notified of the Judgement on April 10. 1987. In an accompanying letter from the Pineville City Court to the petitioner, petitioner was told of his option to appeal. The exact language used by the Court to the petitioner was as follows:

> "You have 30 days to file a Suspensive Appeal from the date that you receive this Notice of Judgment."

Still unaware of the change in docket, petitioner, who was without counsel at this

time, assumed that the letter was in error since, according to L.S.A.-R.S. 13:5209, there is no appeal from small claims court. Due to the fact that petitioner felt the letter from the Pineville City Court was in error as to thier right to appeal, petitioner did not research the court records until April 20, 1987, in an attempt to find sufficient evidence to bring perjury charges against respondent. It was at this time that petitioner first became aware of the change in docket. Petitioner made a request to the clerk of court to appeal, however, the clerk informed petitioner that she, the clerk, was unable to file an appeal as she did not know how. On April 21, 1987 petitioner succeded in aquiring counsel, and on April 24, 1987, counsel filed a motion to appeal with the Third Circuit Court of Appeals. Subsequently, counsel withdrew from the case stating:

> "I was unable to obtain a bond for you. There is no transcript in your case and the judge would write out the facts of the case for the appeal court.
>
> "Therefore. I believe your case is not worth pursuing any further ... ."

Subsequently, petitioner, having no legal training, attempted to continue with the case without counsel as he needed the money, demanded of him, in advance, by other attorneys, for the medication and the comforts of his terminally ill daughter.

Respondent filed a motion to dismiss on September 2, 1987 under Article 5002 of the Louisiana Code of Civil Preocedure which provides:

> "A. An appeal from a judgment rendered by a city court or a parish court may be taken only within ten days from the date of the judgment or from the service of notice of judgment, when such notice is necessary.

Further, respondent cited Article 2126 of the Louisiana Civil Procedure which provides:

> "A. The Clerk of the trial court, immediately after the order of appeal has been granted, shall estimate the cost of the preparation of the record on appeal, including the fee of the court reporter for preparing the transcript and the filing fee required by the appellate court. The clerk shall send a notice by certified mail of the estimated costs to the appellant."

(It should be noted at this point that. in the estimated cost of appeal sent to petitioner. it was requested that security in the amount of $1,425.00 be provided or that a bond be posted. The required bond for the appeal was not available to petitioner even though petitioner gave the requested income statements and offered his property as collateral for the bond. The bond company stated that bonds are only given out as favors to certain attorneys. Petitioner then offered property, valued by the tax accessors office at $32,000.00, to the court as bond. This was turned down by the court, even though, according to the clerk of court, this procedure is practiced in criminal cases.

For this reason petitioner was unable to timely perfect his appeal.)

The motion to dismiss was accepted and the appeal was denied.

In the case of Wilder v. Jackson. 1922. 150 La. 864.91 So.245. the Court ruled that:

> "A litigant seeking an appeal could not be prejudiced by the district court clerk's error in fixing the return day within the minimum delay fixed by statute. nor was the appellant prejudiced by lodging the appeal in the Supreme Court within such delay. though the appellee was not required to answer or otherwise act until the delay had expired."

In Salles v. Jacquet. 1901. 106 La. 643. 31 So. 153 the Court ruled:

> "Where the law made it the duty of the trial judge to fix the return day in an order for appeal. any error therein was imputable to him. though the order of appeal was prepared by appellant."

Furthermore. in the case of Portier v. Marquette Cas Co.. 245 La 702. 160 So 2d 585 (1964). the Fourth Circuit Court of Appeal of Louisiana denied the motion to dismiss on the grounds that the record had not been filed timely and held that:

"...the delay had been attributable to the clerk of the trial court and not to the appellant..."

## CONCLUSION

It is evident that the errors which took place in the Parish of Rapides City of Pineville Court has denied the petitioner his right to due process of law as guarenteed to him by the Constitution of the United States.

Due process can not occure if the very facts concerning the nature of the case before the court is not known. If the docket under which a court is to be held has been changed, then the entire proceedings should be held accordingly. Counsel should not have the opportunity to try a case under regular docket, support its case under small claims rules, and then move to dismiss under regular statutes.

The right of a party involved in a case to appeal the decision of a court is an important part of the law process. If the

court which has the jurisdiction over a case misinforms the parties involved in the case as to their right to appeal. by not informing petitioner that the case had been changed to a docket that could be appealed. and then by further misinforming pettitioner as to the time limit for the appeal. subsequently causes the appellant to loose this right to appeal due to the courts error. then the court itself has obstructed the appellants right to due process.

For the forgoing reasons writ of certorari should be granted.

(9)

# 87-1468

No._____

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

JERRY J. PHILLIPS, PETITIONER

VS.

DIANA MINER

APPENDIX TO

PETITION FOR A WRIT OF CERTIORARI

TO THE SUPREME COURT

OF THE STATE OF LOUISIANA

JERRY J. PHILLIPS
PLAINTIFF AND APPELLANT

6600 FIRST STREET
ALEXANDRIA, LOUISIANA
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# TABLE OF CONTENTS


| | Page |
|---|---|
| TABLE OF CONTENTS..... | 1 |
| JUDGMENT FROM PINEVILLE CITY COURT..... | 1 |
| LOUISIANA THIRD CIRCUIT COURT OF APPEALS- MOTION TO DISMISS..... | 4 |
| LOUISIANA THIRD CIRCUIT COURT OF APPEALS- DENIAL OF REHEARING..... | 8 |
| OPINION OF THE LOUISIANA SUPREME COURT..... | 10 |

CIVIL DOCKET NUMBER 85-311 (sc)

JERRY J. PHILLIPS :: :: PINEVILLE CITY COURT

VERSUS :: :: PARISH OF RAPIDES

DIANA MINER :: :: STATE OF LOUISIANA

FILED:3-24-87 :: :: SONYA STEPHENS

# J U D G M E N T

## ON SUIT FOR PAST DUE RENT AND BREAKING LEASE

This matter came on for hearing pursuant to regular assignment. answer and reconventional demand having been filed to plaintiff's petition. and when after considering the pleadings. evidence. offerings and testimony. the Court being of the opinion that Diana Miner has made due proof of her demands. to the extent as hereinafter set out and the law and the evidence being in favor thereof. for the reasons orally assigned. it is. therefore.

ORDERED. ADJUDGED AND DECREED that there be and judgment is hereby rendered in favor of DIANA MINER. and against JERRY J. PHILLIPS.

in the full sum of TWO HUNDRED AND NO/100(200.00) DOLLARS. together with legal interest theron from the date of judicial demand until paid. which said sum represents the return of the security deposit to Diana Miner. It is further

ORDERED. ADJUDGED AND DECREED that there be and judgment is hereby rendered in favor of DIANA MINER. and against JERRY J. PHILLIPS. in the full sum of SEVEN HUNDRED FIFTY AND NO/100 ($750.00) DOLLARS. for attorney's fees. together with legal interest theron from the date of judicial demand until paid. It is further

ORDERED. ADJUDGED AND DECREED that there be and judgment is hereby rendered and the demands of the petitioner. Jerry J. Phillips. are denied. It is further

ORDERED. ADJUDGED AND DECREED that there be and judgment is hereby rendered condemning

JERRY J. PHILLIPS to pay all costs of these proceedings.

JUDGMENT RENDERED. in open court. at Pineville. Rapides Parish, Louisiana. the 24th day of March. 1987.

JUDGMENT READ AND SIGNED. in open court. at Pineville. Rapides Parish. Louisiana. the 24th day of March. 1987.

HONORABLE F. JEAN PHARIS
JUDGE. PINEVILLE CITY COURT
PINEVILLE. LOUISIANA

NUMBER 87-903

COURT OF APPEAL. THIRD CIRCUIT

STATE OF LOUISIANA

JERRY J. PHILLIPS

Plaintiff-Appellant

VERSUS

DIANA MINER

Defendant-Appellee

Appeal form the Pineville City Court. Parish of Rapides. State of Louisiana: the Honorable F. Jean Pharis. City Judge presiding.

BEFORE: GUIDRY. DOUCET. and CULPEPPER*. JUDGES.

GUIDRY. JUDGE.

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* Judge WILLIAM A. CULPEPPER. Retired. participated in this decision by appointment of the Louisiana Supreme Court as Judge Pro Tempore.

MOTION TO DISMISS

The defendant-appellee, Diana Miner, moves to dismiss the devolutive appeal of the plaintiff-appellant, Jerry J. Phillips, on the ground that the appeal was filed untimely.

On March 24, 1987, a judgment was rendered, read, and signed in open court, finding the appellant liable unto the appellee for the sum of nine hundred fifty and no/100 ($950.00) dollars, together with legal interest from the date of judicial demand. Notice of the signing of this judgment was mailed to the appellant on April 9, 1987, and the instant motion to dismiss followed on September 2, 1987.

As this case originates from the Pineville City Court, LSA-C.C.P. Art. 5002[1], governing appeals from city and parish courts, provides the time period within which the appellant must take an appeal.

No motion for a new trial was filed in this case, and from the record, it is unclear whether the case was taken under advisement or not, which would govern whether notice was required. The trial court's minute entry states judgment was rendered in favor of the appellee on July 15, 1986 with both counsel present in court. If this is the case, the appellant was not entitled to notice of the signing of the judgment on March 24, 1987, because there is no request for notice in the record. See LSA-C.C.P. Art. 1813 paragraph 2.

Giving the appellant the benefit of the doubt, the appellant would have had to file the motion and order for appeal within ten (10) days of service of the notice of judgment, which occurred on April 10, 1987. The filing of the motion and order of appeal on April 24, 1987 was thus untimely. For these reasons, the appellee's motion is

granted and the appeal is dismissed at his costs.

APPEAL DISMISSED.

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Footnote:

[1]ART. 5002. DELAY FOR APPEAL

A. An appeal from a judgment rendered by a city court or a parish court may be taken only within ten days from the date of the judgment or from the service of notice of judgment, when such notice is necessary.

B. When an application for new trial is timely filed, however, the delay for appeal commences on the day after the motion is denied, or from service of notice of the order denying a new trial, when such notice is necessary.

COURT OF APPEAL. THIRD CIRCUIT

STATE OF LOUISIANA

October 21, 1987

Mr. Jerry J. Phillips

6600 First Street

Alexandria. LA 71303

Re: Jerry J. Phillips

versus

Diana Miner

Our Docket No. 87-903

Dear Mr. Phillips:

Your application for rehearing from the decision of this court dismissing your appeal in the captioned matter, which application is dated October 16, 1987 and was addressed to Judge Guidry, was received and has been turned over to me for attention and reply.

According to our records, notice of our decision dismissing your appeal was mailed to

you on Spetember 28, 1987. Under Rule 2-18.2. Uniform Rules - Courts of Appeal, you are allowed 14 days after the mailing of the notice of the judgment and opinion of the court within which to file an application for rehearing. Your application, mailed October 16, 1987, is therefore untimely and our Uniform Rules preclude any consideration of the same. Accordingly, our decision and judgment dismissing your appeal in this case is now final. Your only recourse at this point is to file an application with the Louisiana Supreme Court seeking supervisory review of the decision of this court.

Very truly yours,

Kenneth J. deBlanc
Clerk of Court

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THE SUPREME COURT OF THE STATE OF LOUISIANA

JERRY J. PHILLIPS

VS. NO. 87-C - 2370

DIANA MINER

- - - - - -

IN RE: Phillips, Jerry J.; Applying for Writ of Certiorari and/or Review, Supervisory Review; to the Court of Appeal, Third Curcuit, Number CA87-0903; Parish of Rapides Pineville City Court Number 85-311 SC

- - - - - -

December 11, 1987

Denied.

JCW

JAD

JLD

HTL

MARCUS & COLE. JJ.. would grant to reinstate appeal.

Supreme Court of Louisiana

December 11, 1987

Franz Labranche

Clerk of Court

For the Court